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Memorandum

TO: DSS Staff, Administrators of Special Education, and Directors of
Massachusetts Private Special Education Schools

FROM: Lewis H. Spence, Commissioner, Department of Social Services
David P. Driscoll, Commissioner, Department of Education

RE: Guidance on Appointment of Educational Surrogate Parents

DATE: October 28, 2002

Representatives of the Department of Education (DOE) and the Department of Social Services (DSS) have met several times over the recent past to discuss the needs of children in DSS care or custody who are eligible for special education services and require the appointment of educational decision-makers, i.e., educational surrogate parents. The agencies agreed to disseminate memoranda to our respective constituencies to promote a shared understanding of who has authority to make special education decisions for children in DSS care or custody.

This memorandum will:

1. Clarify the circumstances under which DOE will assign an educational surrogate parent (ESP) to children in the care or custody of DSS;
2. Define the relationship between such children and their ESPs when the child attains the age of majority (18 years of age) under Massachusetts law; and
3. Address the issue of judicial appointments of special educational decision-makers.

The memorandum reflects the current policy of the Massachusetts Department of Education's Educational Surrogate Parent Program. We are distributing the memorandum to all DSS staff and to superintendents and directors of special education of school districts across the state.

Please note that a revised referral form requesting appointment of an educational surrogate parent is attached.

1. Background: The Framework for the Educational Surrogate Parent Program

The Educational Surrogate Parent Program (ESP Program) exists in response to federal special education law, the Individual with Disabilities Education Act (IDEA). The IDEA requires States to implement procedures to protect the rights of children entitled to special education services who are in the custody of a state agency (a "ward of the state"), or whose parent or guardian cannot be identified or located.

The primary mission of DSS is to protect children who have been abused or neglected in a family setting. In carrying out this mission, DSS may remove a child from his or her home and place the child in foster, group or residential care, until the child can be returned home safely or another permanent living arrangement, such as an adoptive home, can be provided. Although, in most cases, DSS receives custody of a child through a Care and Protection (C&P) petition alleging parental abuse or neglect, it may also obtain custody through a Child in Need of Services (CHINS) petition, based on the child's behavior, or as a result of a private custody dispute. Children also enter DSS care through voluntary agreements between their parent(s) and the agency.

DOE is the state agency responsible for assigning a person to act in special education matters on behalf of a child in certain circumstances in which DSS has obtained care, custody or guardianship of the child. The term used to describe these individuals is "Educational Surrogate Parent," or ESP. The ESP Program recruits and trains volunteers to act as decision-makers in special education matters for those students, ages 3 – 22, whose parents are unable or unavailable to fulfill their responsibilities in this regard. Neither a parent's lack of expertise in special education issues nor lack of fluency in English is a basis to seek appointment of an ESP for a student. An ESP has the same rights and responsibilities as a parent for purposes of special education decision-making. This means that the ESP has authority to, among other things, review the child's educational records, consent to special education evaluation, accept or reject an Individualized Education Program (IEP), request an independent evaluation and request mediation or a hearing to resolve special education disputes.

DOE operates its ESP Program under contract with a private vendor, which acts as its agent for this purpose.¹ The ESP Program matches eligible students with ESPs. Once a match is made, the ESP Program issues an appointment letter to the ESP formalizing the

¹ As of this writing, the address and telephone number of the ESP Program is 167 Lyman Street, P.O. Box 1184, Westboro, MA, 01581; tel: 508-792-7679; fax: 508-616-0318.

relationship between the individual and the student. The ESP Program sends copies of the appointment letter to the responsible school district(s), the child's DSS worker and to other identified professionals involved with the student. The assigned ESP then has authority to provide consent for evaluations and make other decisions regarding special education matters.

Federal law is clear about who can be appointed an ESP for decision-making in special education matters. An individual having special education decision-making authority must:

1. Be older than 18 years of age;
2. Not be an employee of a public agency involved in the care or education of the specific student;
3. Have no interest that might conflict with the interests of the student; and
4. Have adequate knowledge and skills to represent the student.

Since DSS workers are "involved in the care...of the specific student" and there are potential conflicts of interest, DSS employees cannot be appointed ESPs. As such, they may not make special education decisions for children in DSS care or custody. However, this provision does not bar DSS workers from referring a child for a special education evaluation if the child appears to be a student who may have educational disabilities.² In cases where referral for evaluation is appropriate, the DSS worker should simultaneously refer the child to the ESP program for immediate appointment of an ESP *if appropriate* under this memorandum.

II. When an Educational Surrogate Parent Should be Appointed for a Child in Placement

The determination of whether an ESP should be appointed for a DSS-involved child turns on whether the child is in the care or custody of DSS, and if in DSS custody, the reason for the placement. Even where DSS has custody, the agency may permit the parent to continue in a decision-making capacity for special education purposes, assuming there are no protective concerns.

- A child is in the "care" of DSS if the child is placed outside of the home by DSS pursuant to a Voluntary Placement Agreement (VPA). The parent should continue to be the child's education decision-maker. As such, no referral to the ESP Program is necessary.
- A child is in the "custody" of DSS when the court issues an order transferring custody from the parent or guardian to DSS. The majority of children in DSS custody are in custody due to either the initiation of a CHINS petition or a Care and Protection (C&P) proceeding. In general, if a child is in DSS custody due to child-related issues³

² It is also important to emphasize that this restriction only applies to special education matters. It does not restrict the authority of DSS workers in regular education matters.

³ Some consented-to "23 C" petitions filed in the Probate Court may also fall into this category. In these cases, a VPA has preceded the Probate Court action.

(for example, CHINS cases) as distinct from parental fitness issues (i.e., Care and Protection proceedings), DSS will permit the parent to continue to function as the child's educational decision-maker in matters regarding special education. Hence, an ESP is not required and no referral to the ESP Program is required.

- ESPs are required for children who are in custody for protective reasons. In these cases, the DSS worker should make a referral promptly to the ESP Program if the child is a special education student when s/he enters DSS custody or the worker has made a referral to the responsible school district to determine the child's eligibility for special education services.
- Unusual circumstances may occur which would warrant departure from the general principles outlined here and the appointment of an ESP. In such cases, a referral may be made to the ESP Program with an explanation of the basis for the requested appointment. The ESP Program will consider these requests on an individualized basis after consultation with the child's DSS worker or other appropriate DSS representative.

As noted earlier, a DSS worker may refer a child for a special education evaluation if the worker believes the child has a disability that interferes with the child's progress in school. If the child needs an ESP, the worker should refer the child to the ESP program at the same time using the attached referral form. If the child is eligible for an ESP and there is none immediately available, the Director of the ESP Program may authorize the school district to proceed with the child's initial evaluation. DOE has authorized the ESP Program director to take this action to avoid delay in the commencement of the child's initial evaluation. As soon as possible, the ESP Program will assign an individual to be the ongoing ESP for all other decision-making related to special education for the child, including participation in the initial Team meeting.

When referring a child to the ESP Program, DSS workers are strongly encouraged to suggest individuals meeting the eligibility criteria discussed earlier whom they know are interested and available to act as the child's ESP.

Once an ESP is appointed for a child, the DSS worker should make sure that the ESP Program or the ESP is informed in a timely manner anytime the child changes his or her placement and/or address.

It is important to underscore that the appointment of an ESP does not preclude parents from participating in their child's education. In most cases, the parent(s) can and should be encouraged to attend their child's Team meetings, as well as other school meetings, and to work with the ESP on behalf of their child. This is particularly appropriate when the child is expected to return home.

III. Foster Parents as Educational Decision-Makers

Appointment as ESP for Children in Protective Cases

If a child is in DSS custody as a result of a C&P petition or Probate Court action brought for protective reasons, the child is placed in a foster home and the foster parent agrees, DSS generally will request that the foster parent be appointed as the child's ESP. If the foster parent is qualified to assume the role of ESP (see the four criteria that appear on page 3), the ESP program will appoint the foster parent to act as the child's ESP. In some instances, as explained below, the foster parent may be the child's special education decision-maker without needing a referral to, and appointment by, the ESP Program.

Long Term Foster Care: Foster Parent "Acting as a Parent" in Protective Cases

The federal special education law recognizes that foster parents may form "ongoing, long-term parental relationships" with the children in their care. In such circumstances, a foster parent need not be appointed as an ESP but, instead, may be deemed to be "acting as a parent" for special education purposes.

A foster parent is deemed to have a long-term relationship with a child who is the subject of a C & P petition or other protective proceeding if: 1) the child has been placed in the foster parent's home for at least six months; 2) the foster parent is willing and able to assume special education decision-making responsibilities; 3) the foster parent has no interests that conflict with those of the child. In these circumstances, no referral to the ESP Program is necessary.

Foster parents may obtain information and other assistance regarding special education decision-making by contacting the *Federation for Children with Special Needs* at (800) 331-0688.

Important Note:

A foster parent is not viewed as "acting as a parent" when the child's actual parent continues in that role. A foster parent may be deemed to be "acting as a parent" for special education decision-making only in the following circumstances: 1) the child is in DSS custody as a result of a C&P petition or other protective action; and 2) the child has been placed with the foster parent for at least six months; and 3) DSS and the foster parent agree that the foster parent will make special education decisions for the child. The foster parent may not be deemed "acting as a parent" for special education purposes in cases in which the child is in foster care as a result of a voluntary placement agreement, a Probate Court action initiated for non-protective reasons or a CHINS petition, and the parent has continued to act as the child's special education decision-maker.

IV. Appointment of Special Education Advisors for Students over the Age of Eighteen Who Continue to Be Involved with DSS

In Massachusetts, a student who has reached the age of majority (eighteen years of age) is an adult according to law. An 18-year-old student is presumed competent to make his or her own decisions. This presumption of competency applies to students age

18 and older who are in the care of DSS. Such students are no longer eligible for an appointed ESP.

However, students 18 and older in DSS care may request continued assistance with special education decision-making if they had an appointed ESP at the time of their 18th birthday. In such cases, the ESP serving the student on his/her 18th birthday may continue to serve the student as a “special educational advisor.” This arrangement is contingent on the willingness and availability of the assigned ESP to serve in the new role. The responsibilities of a special educational advisor are to assist the student in understanding any proposed special education program and to advise the student of his/her rights in making special education decisions. The authority to make such decisions, however, remains with the student.

If an adult student in DSS care would like an appointed ESP to continue to assist him or her in special education matters, the student should make that request in writing to the ESP Program. The ESP Program will verify in writing the change from the existing ESP appointment to an appointment as a special educational advisor, assuming that the ESP is willing and available to serve the student in the new role.

The student’s special educational advisor will retain his/her status as advisor until the student is no longer eligible to receive special education services. If the student and/or the special educational advisor choose(s) to discontinue their relationship before that time, the student will not be eligible for appointment of another special educational advisor.

On occasion, DSS has custody, or is the guardian, of an individual 18 or older who was in DSS care or custody before turning 18 and has been adjudicated incompetent. In such cases, an ESP will be appointed as soon as the DSS worker provides documentation to the ESP program of the guardianship appointment or continued custody. An adult student who has been adjudged incompetent will continue to have the right to an appointed ESP until the student is no longer eligible to receive special education services or the custody/guardianship is terminated, whichever comes first.

V. Judicial Appointments of Educational Decision-Makers

From time to time, judges in the Juvenile, and Probate and Family Courts appoint individuals to act on a child’s behalf in various education matters. Such appointments are usually contained in written orders. Depending on the language of the order, the individual may or may not have authority to be the child’s ESP for special education purposes. If the order specifies that the individual is appointed as the child’s decision-maker for special education purposes, the individual may be presumed to have the appropriate authority. Upon request, and provided a copy of the order is sent to the ESP Program, the ESP Program will confirm the appointment and notify the appropriate school officials and DSS. If the individual is appointed by the court as the child’s “educational advocate” or to a similar role, the ESP Program will not consider the individual to be an ESP for the child until such time as the ESP program determines that

the individual meets the appointment requirements outlined on pages 3-4 of this memorandum. Once ESP appointment requirements are met, the ESP Program will recognize the individual as the child's ESP and issue an appointment letter with copies to appropriate school officials and DSS. Should the individual be unwilling or unable to meet appointment requirements, the ESP Program will appoint a different person as the child's ESP, if needed.

It should be noted that if a court appoints a guardian ad litem (GAL) or educational advocate with special educational decision-making authority and the parent had been making special educational decisions for the child, the parent no longer has the right to consent to evaluations, to sign IEPs, or to ask for mediation or a hearing to resolve special education disputes. By appointing the GAL or educational advocate and conferring special education decision-making authority on that person, the court effectively takes away from the parent any authority s/he may have had to act on behalf of her/his child in this area.

VI. Obtaining Additional Information

Questions regarding the ESP program should be directed to Michelle Poulin, Program Director, at (508) 792-7679. Questions regarding DSS-related issues should be directed to Susan Stelk, DSS Education Coordinator at (617) 748-2340. Questions from school personnel regarding ESP-related issues may also be directed to Marcia Mitnacht, State Director of Special Education, at (781) 338-3388.

Cc: Marcia Mitnacht, State Director of Special Education, DOE
Michelle Poulin, Director of Educational Surrogate Parent Program
Susan Stelk, Education Coordinator, DSS